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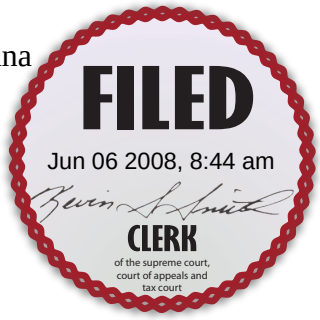

IN THE
COURT OF APPEALS OF INDIANA

RONALD D. OSBORNE,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 14A01-0710-PC-475
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE DAVIESS SUPERIOR COURT
The Honorable Judith H. Dwyer, Judge
Cause No. 14D01-9903-CF-164

June 6, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Ronald D. Osborne[1] challenges the denial of his "Motion for Jail Time Credit." App. at 31. We reverse and remand.

Facts and Procedural History

On March 1, 1999, the State charged Osborne with possession of paraphernalia, possession of a narcotic substance, dealing in a controlled substance, manufacture of controlled substance, and conspiracy to commit dealing. *Id*. at 2.[2] Later that same year, the charges were amended, Osborne pled guilty to class B felony conspiracy to deal a schedule II controlled substance, a habitual offender allegation was added, and other charges were dismissed. *Id*. at 7, 8, 19. According to a June 21, 2000 entry in the chronological case summary ("CCS"), Osborne's sentence was as follows:

> Defendant sentenced to IDOC for 15 years and costs; credit for 481 days served; 2 years suspended; Court finds defendant is a Habitual Offender and sentences defendant to IDOC for 10 years, to be served consecutive to sentence in Count IV; Habitual Offender sentence suspended; supervised probation 12 years[.]

Id. at 8, 19.[3]

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[1] Osborne's last name appears without the "e" in various parts of the materials presented on appeal. For consistency's sake, we shall use the spelling that appears on the front cover of his pro se appellant's brief. We apologize to Osborne if we have chosen incorrectly.

[2] Although Osborne states that he was originally arrested on February 26, 1999, the chronological case summary ("CCS") begins with a March 1, 1999 entry noting the filing of charges. App. at 2.

[3] A June 20, 2000 probation order states that Osborne should be credited for "281 actual days served." App. at 19. Given that Osborne was sentenced more than a year after charges were filed, and that the CCS states that he received credit for 481 days served, we assume that the "281" is a typographical error.

In early 2002, Osborne requested a sentence modification but was denied. On May 1, 2003, Osborne, by counsel, filed a petition to modify sentence to home detention and/or county work release. *Id*. at 10. On September 3, 2003, the court granted Osborne's motion and allowed him to serve the remainder of his sentence on home detention beginning October 5, 2003. *Id*. at 11.

On August 5, 2004, the State filed a petition to revoke suspended sentence and to revoke home detention; for support, the State cited a July 1, 2004 failed drug test. *Id*. at 25-26. Within that petition, the State alleged that as of August 3, 2004, Osborne had 481 days of jail time credit prior to sentencing and 1201 days of jail time credit after sentencing (1682 days total), plus 303 days on home detention. *Id*. at 25. An arrest warrant was returned served on August 11, 2004. *Id.* at 12.

On October 19, 2004, the court held a hearing on the petition to revoke. Tr. at 106-84. During that hearing, a representative from Lighthouse Mission testified that it was willing to transport Osborne to, and fund his entire stay at, a program called Teen Challenge.[4] *Id*. at 168-69, 173. Teen Challenge was described as a fifteen-month, intense, residential, religious-based, drug treatment program in Illinois and Missouri. *Id*. at 173, 175, 177-78, 191. The prosecuting attorney indicated his willingness to continue the hearing, stating: "Let [Osborne] go to Teen Challenge, if he completes it fine, we'll come back and see where we're at in fifteen months and if he doesn't complete it then he goes to jail." *Id.* at 181, 182. In allowing Osborne to be released to Teen Challenge, the court stated:

[4] Despite its name, Teen Challenge is open to adults as well as teenagers. Tr. at 179.

> If he completes Teen Challenge, he needs to return to the Security Center and report to his attorney and we'll continue – have a hearing. This hearing will be continued, it is all to be at Lighthouse's expense and not the county's. The county is not to transport him, Lighthouse is[.]
>
> ….
>
> I'll tell you right now, Good Luck, because there's no, no more chances, this is two. You strike out, you strike out, Okay? …. And you're facing a long sentence. Good Luck.

Id. at 182-84. According to Osborne, he went to Teen Challenge in mid-November 2004. App. at 31.

On January 4, 2005, the court received a letter from Diana Snyder, director of Daviess County Community Corrections, in which she stated that on December 18, 2004, Osborne had "self-terminated his placement" at the Illinois Teen Challenge Peoria Center. *Id*. at 29. Not only had he left the program, but Osborne also had not reported to the Daviess County Security Center. *Id*. at 29, 14. A warrant was issued on January 11, 2005. *Id*. at 14. On February 15, 2005, the State filed a petition to increase bond. *Id*.

On May 4, 2005, the court held a hearing attended by Osborne, his appointed counsel, and the prosecuting attorney. The prosecuting attorney stated:

> we have calculated his days of jail time, as he has served Two Thousand Ninety Six [2096] Days in jail as of today and he's entitled to One Thousand Seven Hundred Sixty Eight [1768] Days of credit as of today, credit time. Well, that's incorrect, the Two Thousand Ninety Six [2096] Days includes Three Hundred Ten [310] Days of home detention but the total amount of time he's entitled to is Two Thousand – Two Thousand Ninety Six [2096] plus One Thousand Seven Hundred Sixty Eight [1768].

Tr. at 186. Osborne's counsel did not dispute the numbers, but admitted that she did not have her file with her. *Id*. at 186, 188, 189. At the conclusion of the hearing, the court ordered Osborne to serve the remainder of his twenty-five year sentence and found that he should

"receive Two Thousand Ninety Six Dollars [sic]–Ninety Six Days of jail and home detention actual time and One Thousand Seven Hundred and Sixty[5] Days credit." *Id*. at 193-94. In its written sentencing order, the court found that Osborne "should be given credit for 1768 actual days already served" and "1768 days credit time plus 310 actual days served on Home Detention." App. at 30.

On October 21, 2005, Osborne, pro se, filed a motion for earned credit time, no copy of which appears in the appendix. *Id*. at 15. Thereafter, Osborne unsuccessfully sought a sentence modification. *Id.* On June 26, 2006, Osborne, pro se, filed a petition for an amended abstract of judgment, which was denied three days later. *Id*. at 16. In the summer of 2006, Osborne, still pro se, began initiating appeal procedures. *Id.* at 17.

On July 10, 2007, Osborne, designating himself as "petitioner pro se," filed a motion for jail time credit. *Id*. at 17, 31-33. Within his motion, Osborne mapped out the days of jail time that he had served and contended that he was entitled to 1943 days rather than 1768 days. *Id*. In its response, filed August 8, 2007, the State asserted that Osborne's failure to complete Teen Challenge bars him from receiving any credit for the "48" days spent there, and that the State "is without sufficient information at this time to address the remainder of" Osborne's claims. *Id*. at 18, 34.[6] Approximately one week later, the court issued its order,

[5] The prosecuting attorney immediately clarified that it was sixty-eight (i.e. 1768), not sixty (1760), days. Tr. at 193. In actuality, 1768 was not correct either because 2096 minus 310 is 1786, not 1768. However, neither party notes this apparent transposition.

[6] The prosecuting attorney who filed this response was not the same attorney who appeared at the May 4, 2005 sentencing hearing and offered the jail and credit time calculations. Tr. at 185; App. at 34. Perhaps that is why the subsequent prosecuting attorney perpetuated the erroneous 48-day reference, which originated in Osborne's July 10, 2007 motion for jail time credit. *See* App. at 31 ("This petitioner was also sent to Teen Challenge program on November 16th, 2004, through and including January 4th, 2005, for a

which reads in its entirety: "The Court having had the defendant's Motion For Jail Time Credit under advisement now denies the same." *Id*. at 18, 36. It is from this order that Osborne appeals.

Discussion and Decision

In his pro se brief, Osborne contends that the court failed to award him "175 actual days and 175 days credit time and 33 actual days served at teen challenge[.]" Appellant's Br. at 7. The State faults Osborne for not presenting a sufficient record for appellate review and replies that he is not entitled to any time, jail or credit, for Teen Challenge.

"It is Appellant's duty to present an adequate record clearly showing the alleged error. Where he fails to do so, the issue is deemed waived." *Thompson v. State*, 761 N.E.2d 467, 471 (Ind. Ct. App. 2002). We have previously held that a defendant may waive a claim of entitlement to credit for time served by failing to present us with sufficient information to determine the issue. *See id*.; *see also Brattain v. State*, 777 N.E.2d 774, 776 (Ind. Ct. App. 2002) (holding that defendant failed to meet burden of demonstrating that trial court abused discretion by denying request for credit for time served where defendant "*failed to present any documentation* to the trial court that he was entitled to credit for time served" and "failed to present an adequate record showing that the trial court erred by denying his request for credit time") (emphasis added); *Gardner v. State*, 678 N.E.2d 398, 401 (Ind. Ct. App. 1997) (holding that defendant did not meet his burden of demonstrating that trial court erred by

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total of (48) days jail credit petitioner is owed."). However, as the January 4, 2005 letter from community corrections revealed, Osborne left Teen Challenge on December 18, 2004. *Id*. at 29. Thus, if Osborne arrived at Teen Challenge in mid-November and departed on December 18, he was there for approximately thirty-three days, not forty-eight days.

denying his request for credit time where there was "*no evidence* upon the record of the defendant being incarcerated during the pertinent dates or the reason for which he may have been incarcerated") (emphasis added).

While waiver would be an expedient way to dispose of this appeal, the combination of odd circumstances presented in Osborne's case convinces us that a closer look is warranted. For instance, we are troubled by the record's open and obvious mathematical and numerical errors that we have found but that have not been mentioned by the parties or the court. The fact that Osborne's counsel did not have her file at the sentencing hearing also causes us concern. The idea that the State, which offered the jail time/credit time calculation to the trial court, was "without sufficient information" to address whether the calculation was correct likewise gives us pause. App. at 34. Indeed, on appeal, the State candidly "takes no position with regard to whether and to what extent [Osborne] is entitled to additional jail time credit except that [Osborne's] request for jail time credit for Teen Challenge should be denied." Appellee's Br. at 7. In light of these issues and despite deficiencies in Osborne's pro se appeal, we examine Osborne's claim.

Though inartfully drafted, Osborne's brief clearly raises a calculation error. Specifically, Osborne contends that he was entitled to time served and credit time for the following: (1) jail time from August 11, 2004 through mid-November 2004; (2) time spent at Teen Challenge; and (3) jail time from February 15, 2005 through May 4, 2005.

Indiana Code Section 35-50-6-3 provides that a person imprisoned for a crime or confined awaiting trial or sentencing earns one day of credit time for each day he is imprisoned for a crime or confined awaiting trial or sentencing. *See Stephens v. State*, 735

N.E.2d 278, 284 (Ind. Ct. App. 2000), *trans. denied*. Determination of a defendant's pretrial credit is dependent upon pretrial confinement, and the pretrial confinement being a result of the criminal charge for which sentence is being imposed. *Payne v. State*, 838 N.E.2d 503, 510 (Ind. Ct. App. 2005), *trans. denied*.

Osborne does not quibble with the time calculations prior to August 2004, hence we start there. As of August 3, 2004, Osborne had 481 days of jail time prior to his June 21, 2000 sentencing and 1201 days of jail time after June 21, 2000, for a total of 1682 days jail time (as well as 1682 credit time days), plus 303 home detention days. App. at 25 (State's August 5, 2004 petition to revoke suspended sentence and home detention); *see Purcell v. State*, 721 N.E.2d 220, 221 (Ind. 1999) (holding that defendant, who was on home detention under supervision of community corrections program, was entitled to days credit for time actually served toward sentence).

Osborne claims that he was rearrested on August 11, 2004. This rearrest date is supported by the August 11, 2004 CCS entry that indicates the warrant was returned as served that day. Moreover, the number of home detention days eventually credited to Osborne was 310, which would imply that he continued on home detention from August 3, 2004 until his arrest date approximately seven days later. Osborne maintains that he was in jail from August 11, 2004 through the day he left for Teen Challenge, November 15, 2004. *See also* Tr. 182-83 (court ordered Osborne to Teen Challenge); App. at 13 (CCS entry showing phone interview between Osborne and Teen Challenge). He argues that he was entitled to ninety-seven days for jail time served. We agree and note that an equal amount of credit time may be available.

As for Osborne's time spent in Teen Challenge, we agree with the State that no time was earned. *See Oswalt v. State*, 749 N.E.2d 612, 614-15 (Ind. Ct. App. 2001) (affirming no award of time served at substance abuse facility where placement not entirely voluntary, court did not monitor program, and defendant's movement was not restricted by court); *see also Dixon v. State*, 685 N.E.2d 715, 717-18 (Ind. Ct. App. 1997) (affirming the denial of days served in a substance abuse rehabilitation program and a halfway house where the defendant entered the programs voluntarily with the permission of the trial court). While at Teen Challenge, Osborne was not committed to the DOC's custody, nor was there an arrangement that his activities would be monitored by the DOC, the court, or the State. His movements were not restricted in the voluntary program. Thus, Osborne could leave the program and indeed did just that on December 18, 2004. Given the nature of Teen Challenge, Osborne is not entitled to jail time or credit time for the days spent there.

About a week after receiving the January 4, 2005 letter stating that Osborne had "self-terminated" his placement at Teen Challenge, the court issued a warrant. Osborne claims that he was rearrested on February 15, 2005, and the CCS supports that date. *See* App. at 14 (noting that State filed petition to increase bond). Osborne further asserts that he remained in jail from his February 15, 2005 arrest until his May 4, 2005 sentencing hearing. The CCS entries do not contradict these dates. He argues that he was entitled to seventy-eight days for jail time served. We agree and note that an equal amount of credit time may be available.

In sum, it appears that Osborne was entitled to jail time days as follows:

1682 (481 days jail time pre-June 21, 2000 + 1201 days jail time post-June 21, 2000)
97 (jail time from August 11, 2004 through November 14, 2004)
0 (Teen Challenge)

+ 78 (jail time from February 15, 2005 through May 4, 2005)
1857 total, not including 2167 days (310 home detention + 1857 possible credit)

The court, however, awarded him 1768 days. Given the days to which Osborne is entitled, we cannot discern how the court came up with its total, even if we transpose the numbers, as apparently occurred at least once during the proceedings below. The State provides no insight or explanation. Acknowledging the possibility of error in the dates we relied upon, but convinced that the 1768 figure is incorrect, we remand for a hearing and a recalculation of jail time, which may also affect credit time. *See Ramirez v. State*, 455 N.E.2d 609, 617 (Ind. Ct. App. 1983) (remanding to trial court with instructions to conduct hearing to recalculate credit time). In reaching this conclusion, we reiterate that if not for the unusual circumstances of this case, we would likely have found waiver.

Reversed and remanded.

BARNES, J., and BRADFORD, J., concur.